IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

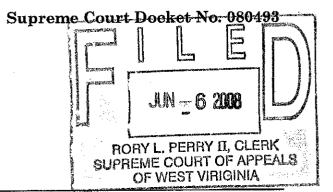
CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Plaintiff,

ST. PAUL FIRE AND MARINE

INSURANCE CO.,

Defendant.



ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S BRIEF ON CERTIFIED QUESTIONS POSED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No.: 6:06-CV-01013 Honorable Joseph Robert Goodwin, Presiding

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TABLE OF CONTENTS

MEM	EMORANDUM OF PARTIES	ii
TABI	BLE OF CASES AND AUTHORITIES	iv, v
	ND OF PROCEEDING AND NATURE OF	
STAT	ATEMENT OF FACTS	
CER'	RTIFIED QUESTIONS	
STA	ANDARD OF REVIEW	
ARG	GUMENT	
A.	In West Virginia, The Insured Plaintiff In Action Has The Burden Of Proving That of Disputed Claims And The Burden Only S Defendant After Coverage Is Established	Coverage Exists On All hifts To The Insurer
В.	The Greater Weight Of The Caselaw Sugar Should Bear The Burden Of Proving The From An Unallocated Verdict, And In The Shifts To The Insurer, The Trial Court Is Record, Verdict Form And Trial Transcrip Properly Allocate The Damages	Apportionment Of Damages ose Cases Where The Burden Instructed To Interpret The ot To Determine How To
	1. The Cases Cited By Plaintiff In Sup Concerning Allocation Are Distingu The Instant Case	uishable From The Facts Of
C.	Regardless Of Whether The Burden To Propagation The Verdict Rests With The Jury Verdict Form And The Trial Transfer That The Jury's Award For The Tort Of Control Damages Was Because Of An Intentional Policy	he Insured Or Insurer, Both Inscript Support The Fact Outrage And Punitive Act Not Covered Under The
	1. An Ambiguity In The Verdict Form Against The Defendant Simply Bed Company	ause It Is An Insurance

D.	Plair	ntiff's Estoppel Argument Must Fail Because Defendant Issued A
	Valid	Reservation Of Rights Letter And Denial Of Coverage Under
	Both	The Basic And Umbrella Policies, Prior to Any Detrimental
	Relia	ance By the Plaintiff
	1.	Based On The Conduct Of Camden-Clark And Its Counsel In
•		Handling The Underlying Claim, Camden-Clark Should Be
		Excluded From Making An Equity Argument Because It Comes
		To The Court With Unclean Hands 40
		w -
CON	CLUS	SION

MEMORANDUM OF PARTIES

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Cleaver v. Big Arm Bar & Grill, 202 W.Va. 122, 128 (1998)
Commercial Union Ins. Co. of N.Y. v. Reichard, 404 F.2d 868 (1968)
Duke v. Hoch, 468 F.2d 973 (1973)
Feliciano v. 7-Eleven, Inc., 210 W.Va. 740, 744, 559 S.E.2d 713, 717 (2001) 14
Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F.Supp. 710 (1981) 26
General Accident Fire & Life Assurance Corp. v. Clark, 9 Cir., 1929, 34 F.2d 833; 18
Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co., 85 Cal.App.4th 1300 (2001)
High Plains Co-op Ass'n v. Mel Jarvis Const. Co., Inc., 137 F.R.D. 285 (1991) 34
Hirrera v. American Standard Ins. Co., 203 Neb. 477, 279 N.W.2d 140 (1979) 34
Hoglund v. Curtis, 134 W.Va. 735, 752, 61 S.E.2d 642, 652 (1950) (Citing 30 C.J.S., Equity § 93)
In re Feature Realty Litigation, unreported, 2007 WL 2156605 (E.D. Wash) 19
Jarvis v. Pa. Cas. Co., 129 W. Va. 291, 291, 40 S.E.2d 308, 309 (1946) 15
Legg v. Junior Mercantile Company, 105 W.Va. 287, 142 S.E. 259 (1928) 15
Light v. Allstate Ins. Co., 203 W.Va. 27, 506 S.E.2d 64 (1998)
Maryland Cas. Co. v. Gordon, 52 Tenn.App. 1, 371 S.W.2d 460 (1963) 18
Miller v. United Fuel Gas Co., 88 W.Va. 82, 106 S.E. 419 (1921)
Moore v. Mustoe, 47 W.Va. 549, 552, 35 S.E. 871, 873 (1900)

Morris v. Western States Mut. Aut. Ins. Co., 7 Cir., 1959, 268 F.2d 790 18
Osborne v. United States, 211 W.Va. 667, 670, 567 S.E.2d 677 (2002) 14
Payne v. Weston, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995)
Pizzini v. American Int'l Specialty Lines Ins. Co., 210 F.Supp.2d 658 (E.D. Pa. 2002
Premier Parks, Inc. v. TIG Ins. Co., No. 02C-04-126-PLA, 2006 WL 2709235 (Del. Super. Sept. 21, 2006) 23
Province v. Province 196 W.Va. 473, 484, 473 S.E.2d 894, 905 (1996) 39, 40
Raychem Corp. v. Fed. Ins. Co., 853 F.Supp.1170 (1994)
Richards v. Musselman, 221 Va. 181, 267 S.E.2d 164 (1980)
State Auto. Mut. Ins. Co. v. Alpha Engineering Servs., Inc., 208 W. Va. 713, 716, 542 S.E.2d 876, 879 (2000)
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Universal Underwriters Insurance Corp. v. Reynolds, 129 So.2d 689, 691 (1961) 18
United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F.Supp. 1320 (1990) . 21
Wallace v. St. Clair, 147 W.Va. 377, 400, 127 S.E.2d 742, 757 (1962)
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I. KIND OF PROCEEDING AND NATURE OF RULINGS IN LOWER TRIBUNAL

This case is a declaratory judgment action filed by Camden-Clark Memorial Hospital Corporation in the United States District Court for the Southern District of West Virginia. After considering Camden-Clark's motion for partial summary judgment, the district court certified questions to this Court as to which party, the insurer or the insured, should bear the burden of proof when a verdict against an insured does not specify (1) whether covered or non-covered conduct gave rise to the insured's liability, and (2) whether the punitive damages awarded were based on a covered or non-covered claim.

II. STATEMENT OF FACTS

Bernard R. Boggs, as Administrator of the Estate of Hilda Boggs, deceased, as personal representative of the statutory beneficiaries of a wrongful death claim, in his own right, filed a June 30, 2003 Complaint for medical malpractice and intentional torts in the Wood County Circuit Court, styled Boggs v. Camden Clark Memorial Hospital Corp., et al, Civil Action No. 03-C-296. See the June 30, 2003 Complaint, in the

¹ There actually were four cases filed as a result of the death of Hilda Boggs: Civil Action No. 02-C-202 (Boggs I), brought by Bernard Ray Boggs and which was dismissed for failure to achieve service of process within 120 days of filing the Complaint; Civil Action No. 03-C-296 (Boggs II); Civil Action No. 03-C-623 (Boggs III) and Civil Action No. 05-C-527 (Boggs IV). Boggs II and Boggs III are functionally identical in their claims against Camden-Clark, with the difference being that Boggs II was governed by the first version of the West Virginia Medical Professional Liability Act ("MPLA"), W.Va.Code §55-7B-1, et seq, that was in effect prior to July 1, 2003, and Boggs III was governed by the version of the MPLA after June 30, 2003. Boggs IV is a suit brought for abuse of process and malicious prosecution because Camden-Clark originally had filed counterclaims against Mr. Boggs as part of the Boggs II and Boggs III cases.

Record. That lawsuit alleged that while decedent, Hilda Boggs, was admitted to Camden-Clark Memorial Hospital for an open reduction and internal fixation surgery on her ankle, the defendants, Camden-Clark Memorial Hospital (hereinafter "Camden-Clark"), United Anesthesia, CRNA Evelyn Melvin and Manish Koyawala, M.D., breached the applicable standard of care, resulting in her death. *Id.* Specifically, Mr. Boggs alleged that the defendants administered anesthesia in such a manner as to oversedate Mrs. Boggs, inappropriately dosed hyperbaric lidocaine and inadequately monitored Mrs. Boggs while she was in the hospital.

Among the other claims made against Camden-Clark were allegations of negligent hiring, negligent retention, negligent privileging, destruction or despoliation of evidence, falsification of medical records, making false statements, fraudulent concealment and fabricating or falsifying evidence. *Id.* Mr. Boggs also requested that Camden-Clark and United Anesthesia be held vicariously liable for all the actions of Dr. Koyawala regarding the treatment or lack thereof rendered to Hilda Boggs, under theories of actual, apparent or implied agency, respondeat superior, ratification and vicarious liability. *Id.* at ¶19. Mr. Boggs requested punitive damages as part of his claim, as a result of the intentional conduct of the Hospital and its staff of destroying notes, altering medical records and creating a cover-up to hide the true details of Mrs. Boggs' death. *Id.*

At all relevant times herein, St. Paul Fire and Marine Insurance Company (hereinafter "St. Paul) was the insurance company of Camden-Clark, having written two policies for Camden-Clark. The first policy was a Basic policy effective July 1, 1999

through July 1, 2002, Number 566XM2102 with coverage limits of One Million Dollars (\$1,000,000.00) and a self-insured retention of Two Million Dollars (\$2,000,000.00). See the Basic policy, attached to Defendant's Response to Motion for Summary Judgment, in the Record. The second policy was an Umbrella policy, effective July 1, 1999 to July 1, 2002, Number 566XM2102, with coverage limits of Fifteen Million Dollars (\$15,000,000). See the Umbrella policy, attached to Defendant's Response to Motion for Summary Judgment, in the Record. Both the Basic policy and the Umbrella policy specifically defined what was covered under each policy, extending coverage only in four certain injury categories, specifically in cases of "medical professional injury," "bodily injury and property damage," "personal injury liability," and "advertising injury liability." See the Basic and Umbrella policies, at p. 2-4 of 25.

The Basic policy contained a Two Million Dollar self-insured retention limit and the following provisions regarding the self-insured retention:

Self-Insured Retentions

The self-insured retentions shown in the Coverage Summary and the information contained in this section fix the amount you'll be required to pay, and over which the limits of coverage of this agreement will apply. This is the amount you'll be responsible for, regardless of the number of:

- protected persons;
- claims made or suits brought;
- persons or organizations making claims or bringing suits.

Your self-insured retentions apply to damages, prejudgment interest, postjudgment interest, and claim expenses.

We'll consider any voluntary payment of, or assumption of any obligation to pay, the following above a self-insured retention without our consent to be your responsibility:

- Damages for covered injury or damage.
- Claim expenses.

If you are unable to pay damages, prejudgment interest, postjudgment interess, or claim expenses for covered claims or suits because of your insolvency or bankruptcy or any other reason, this agreement will still apply for amounts in excess of your self-insured retentions shown in the Coverage Summary.

Each person retention. You'll be responsible up to the amount of your each person retention for all covered medical professional injury that results from a health care professional service or a series of related health care professional services to any one person.

Pursuant to the clear language of the Self-Insured Retention in the policy, Camden-Clark was responsible for the payment of all attorney's fees, costs, expenses and even settlements for each claim made against it for a medical professional injury, within the Two Million Dollar retention limit. Essentially, this insurance agreement made St. Paul an excess insurer, with Camden-Clark being its own primary carrier, with Two Million Dollar limits.

The Basic policy also contained two other pertinent provisions regarding the rights, duties and obligations of the parties under the policy:

Right to investigate or defend. We'll have the right to investigate or associate in the defense of any claim or suit for covered injury or damage made or brought against any protected person. We may exercise such rights even if:

- all of the allegations are groundless, false or fraudulent; or
- the total amount of the damages and claim expenses for such injury or damage probably won't exceed the self-insured retention that applies.

However, we have no duty to investigate or defend any claim or suit or perform other acts or services under this agreement, even if the amount of damages or claim expenses exceeds the self-insured retention that applies.²

Thus, under the Basic policy of insurance, St. Paul had no duty to defend Camden-Clark, even if the self-insured retention was exceeded. In fact, St. Paul had no duty to do anything other than pay up to its One Million Dollar policy limits under the Basic policy, but not until after the entire Two Million Dollar self-insured retention was exhausted by Camden-Clark through payment of expenses, attorney's fees, settlement or damages. As its own primary self-insurer, Camden-Clark assumed the duty to defend up to its own policy limits of Two Million Dollars. In fact, the Basic policy contained the following provision which required Camden-Clark to settle any claim within its policy limits where possible:

Your Obligation To Effect Settlement Within The Retained Limit Where Possible

You agree that where your liability is reasonably clear for a claim seeking damages in excess of the retained limit, you have the obligation under this agreement to settle the Claim within the retained limit where reasonably possible.

After receiving the Complaint in Boggs, Camden-Clark hired Attorney Richard Hayhurst to defend the claim and file an Answer. Camden-Clark made the choice to hire Hayhurst as counsel, someone it had worked with in the past. St. Paul was not consulted on the decision, Hayhurst was not approved by St. Paul and St. Paul never

² The Umbrella policy similarly contains the following provision:

Right and duty to defend. We have no duty to defend any protected person against a claim or suit if your Basic insurance, or any other insurance, has a duty to defend that protected person. However, we'll have the right to associate in the defense and control of any claim or suit that is reasonably likely to involve us.

paid any of Hayhurst's legal fees for the defense of any of the Boggs' claims. Instead, per the insurance policy, Hayhurst's fees, along with the other claim expenses, were paid by Camden-Clark as part of the Two Million Dollar self-insured retention.

St. Paul never retained Hayhurst, or any other counsel, to defend Camden-Clark in the Boggs matter, never provided Attorney Hayhurst with a formal letter of retention or assigned him the defense of the Boggs claims and never directed or controlled any of Hayhurst's actions in defending the Boggs' claim. Instead, per its policy, St. Paul acted as an excess carrier would, receiving correspondence from Attorney Hayhurst, counsel chosen by Camden-Clark, and evaluating from afar whether its excess coverage would come into play. St. Paul was not involved in any day-to-day discussions with Plaintiff's counsel, did not participate in any settlement negotiations or mediations and received reports from Attorney Hayhurst only when sporadically provided. In fact, since St. Paul did not retain Attorney Hayhurst, it was not in an attorney-client relationship with him and thus should never have been provided any of the attorney-client privilege materials prepared by Attorney Hayhurst and sent to Camden-Clark. Certainly, without access to all of the thought processes and candid evaluations shared between Attorney Hayhurst and Camden-Clark, St. Paul could never have been expected to have been fully informed about the case and able to properly evaluate the case prior to the exhaustion of Camden-Clark's Two Million Dollar self-insured retention.

On December 27, 2005, Samuel R. McEwen, the Director of Major Case Liability at St. Paul, wrote a reservation of rights letter to Sherry L. Johnston, the Director of Risk Management at Camden-Clark. In that reservation of rights letter, Mr. McEwen

effectively laid out the coverage concerns of St. Paul, specifically its concern regarding the allegations of despoilation of evidence by Camden-Clark, while also generally reserving the right to raise additional coverage arguments as the litigation proceeded. See the December 27, 2005 letter from Samuel R. McEwen to Sherry Johnston, attached to Defendant's Response to Motion for Summary Judgment, in the Record. The reservation of rights letter also generally reserved its rights to limit or deny coverage as follows:

Please be advised that nothing in this letter should be construed as a waiver of St. Paul's rights under any of the provisions of the St. Paul policy or any other defenses that St. Paul may have. St. Paul expressly reserves all of its rights to limit or deny coverage on the basis of any other grounds, whether or not expressly set forth herein. Any investigation, defense, negotiation, or settlement of any claim or lawsuit does not waive or stop St. Paul from subsequently denying a duty to defend or indemnify. *Id.*

On January 4, 2006, Attorney Hayhurst, demonstrating precisely who he represented and where his loyalties lay, drafted a response letter to St. Paul. In said letter, Attorney Hayhurst rejected and disavowed the coverage concerns and reservations expressed by Mr. McEwen in his December 27, 2005 letter and raised eight numbered paragraphs contra. The fact that this letter was written is proof in and of itself that Hayhurst was neither retained by St. Paul to defend the Boggs claim nor directed by St. Paul in any manner, for if he had been it certainly would have been an improper conflict for him to draft a coverage opinion letter to the insurance company on behalf of an insured that he was defending in a claim.

Prior to trial, two of the named defendants, Dr. Koyawala and United Anesthesia, reached a pretrial settlement of the claims against them, paying a total of Two Million Dollars (\$2,000,000.00) to Mr. Boggs, in exchange for a dismissal from the action. This settlement had the effect of providing Camden-Clark with a Two Million Dollar setoff should the case proceed to trial and a verdict be rendered against it.

Trial began on February 28, 2006 with the only defendant remaining, Camden-Clark. Prior to the end of trial, on March 9, 2006, the parties attended a hearing with the Judge to discuss the jury instructions and proposed verdict form. At that hearing, the parties advanced and agreed upon an allocated verdict form, with twenty-eight separate and distinct subparts and multiple opportunities for the jury to apportion fault amongst the parties and to allocate damages against parties, non-parties, and between specific causes of action and certain types of damages. The verdict form was created to prevent any subsequent problems interpreting the allocation of fault and damages and was certainly not a simple verdict form with one interrogatory for liability and another for damages.

At the conclusion of the trial, the jury rendered a verdict on or about March 10, 2006 and awarded total damages in the amount of Six Million Five Hundred Forty-Five Thousand Dollars (\$6,545,000.00). See the Jury Verdict Form, attached to Defendant's Response to Motion for Summary Judgment, in the Record. With respect to the claim for fraudulent concealment, the jury found that Camden-Clark fraudulently concealed information about Hilda Boggs' death from Bernard Boggs and awarded One Hundred Thousand Dollars (\$100,000.00). Id. With respect to the tort of outrage, the jury found

that "Camden-Clark's conduct toward Bernard Boggs was so outrageous that a reasonable person could not have been expected to endure it," and awarded Bernard Boggs Two Hundred Fifty Thousand Dollars (\$250,000.00) for his past emotional distress and One Hundred Twenty-Five Thousand Dollars (\$125,000.00) for his future emotional distress. *Id*.

The jury found Camden-Clark and Dr. Koyawala (who was dismissed, but still placed on the verdict form for the jury to apportion fault amongst the defendants) negligent toward Hilda Boggs and awarded a total of One Million Five Hundred Seventy Thousand Dollars (\$1,570,000.00) in compensatory damages to the Estate of Hilda Boggs. *Id.* The jury also found that "the conduct of Camden-Clark Hospital separate and apart from any conduct of Dr. Koyawala or Evelyn Melvin was so outrageous, wrongful or intentional that punitive damages were awarded in the amount of Three Million Dollars (\$3,000,000.00) against Camden-Clark. *Id.* One Million Five Hundred Thousand Dollars (\$1,500,000.00) was also awarded to Plaintiff for punitive damages against Dr. Koyawala or Evelyn Melvin, who the jury found were apparent agents of Camden-Clark. *Id.*

On April 28, 2006, the Circuit Court entered a Journal Order and Judgment Entry which explained how the Court would apply the Two Million Dollar (\$2,000,000.00) setoff from the settlement between Plaintiff and Dr. Koyawala and Evelyn Melvin to the damages awarded by the jury. See the April 28, 2006 Journal Order and Judgment Entry, attached to Defendant's Response to Motion for Summary Judgment, in the Record. Specifically, the April 28, 2006 Order indicated that the total

damages award against Camden-Clark was Four Million Eight Hundred Thirty-Four Thousand Three Hundred Eighty Dollars (\$4,834,380.00), which represented the total verdict amount, PLUS pre-judgment interest in the amount of Two Hundred Eighty-Nine Thousand Three Hundred Eighty Dollars (\$289,380.00), LESS the Two Million Dollars (\$2,000,000.00) credit from the settlement proceeds paid on behalf of Dr. Koyawala and United Anesthesia. *Id.* According to the Order, the Two Million Dollar (\$2,000,000.00) settlement between Dr. Koyawala, and Evelyn Melvin and the Plaintiff was to first be set off from the One Million Five Hundred Thousand Dollars (\$1,500,000.00) punitive damage award against Dr. Koyawala or Evelyn Melvin. *Id.* The remaining Five Hundred Thousand Dollar (\$500,000.00) setoff was to be applied to the One Million Five Hundred Thousand Dollar (\$1,500,000.00) compensatory damages awarded to the Plaintiff against Camden-Clark and Dr. Koyawala. *Id.*

Following trial, and in reflection of some of the troubling allegations proven by the plaintiff in the underlying case concerning the intentional acts of deceit and coverup on the part of Attorney Hayhurst and representatives of Camden-Clark, St. Paul retained coverage counsel, Attorney Michael Farrell, to render an opinion on the effect that the jury's verdict would have on coverage under both the Basic and Umbrella policies issued to Camden-Clark.

After a thorough review of all the relevant documents, Attorney Farrell issued a coverage opinion letter, dated July 18, 2006, attached to Defendant's Response to Motion for Summary Judgment, in the Record. Essentially, Mr. Farrell's opinion was

that the jury's award of damages for the tortious actions of fraudulent concealment and outrage, as well as the entire award of punitive damages against Camden-Clark, were in consideration and reflection of conduct not covered by the policy, under the "What This Agreement Covers" Sections of both the Basic and Umbrella policies. *Id.* Specifically, Attorney Farrell opined that since the actions giving rise to the jury's award for damages for fraudulent concealment, outrage and punitive damages were not "health care professional services" giving rise to a "medical professional injury," no coverage existed for such damages and thus St. Paul had no obligation to pay said damages. *Id.* Attorney Farrell further opined that whatever portion of the jury's damages award was in fact covered by St. Paul was reduced by the off-set from the Two Million Dollar (\$2,000,000.00) settlement with Dr. Koyawala and United Anesthesia, which was further reduced by the Two Million Dollar (\$2,000,000.00) self-insured retention of the Hospital. *Id.*

Relying on the opinion of its coverage counsel, St. Paul forwarded a copy of Attorney Farrell's opinion letter to counsel for Camden-Clark. In response, on October 20, 2006, counsel for Camden-Clark, Anita Casey, wrote to Laura Toregas, the new Director of Major Case Liability at St. Paul, and explained Camden-Clark's coverage position. See the October 20, 2006 letter from Anita Casey to Laura Toregas, attached to Defendant's Response to Motion for Summary Judgment, in the Record.

Although verdict had been reached in the underlying case, the wheels of justice continued to turn, with the Circuit Court granting the Boggs' Motion for Sanctions and Attorney's Fees against Camden-Clark. Specifically, the Court found cause that

Camden-Clark, and its retained counsel Richard Hayhurst, should be sanctioned, an amount equivalent to the total cost of Plaintiff's attorney's fees for prosecuting the case (exactly One Million, Three Hundred Fifty-Nine Thousand, Two Hundred Forty-One Dollar and Two Cents (\$1,358,241.02)). The specific conduct giving rise to this unprecedented sanction against Camden-Clark and Attorney Hayhurst is described in a 55 page Order and is summarized by the following findings of fact concerning the following conduct:

- 1) Providing knowingly erroneous discovery responses and withholding information in discovery responses, including withholding statements from fact witnesses and indicating that no notes exist after Camden-Clark destroyed those notes;
- 2) Destroying medical records, including altering the cardiac rhythm strips, and attempting to "get together a story" about what really happened;
- 3) Serial violations of numerous court orders regarding discovery, including the production of incomplete privilege logs, and refusing to follow court orders:
- 4) Purposely and intentionally filing inaccurate legal filings;
- 5) Intentional false testimony by Camden-Clark representatives at trial, some of which went uncorrected although counsel for Camden-Clark knew it to be incorrect and incomplete;
- 6) Misleading and inaccurate statements to the Court, the Plaintiff and the jury from Camden-Clark's counsel and Camden-Clark's representatives; and,
- 7) Camden-Clark's inaccurate answer to the Plaintiffs' Complaint.

See the May 24, 2007 Order Granting Plaintiff's Renewed Motion for Sanctions and Motion for Attorney's Fees, in the Record.

On or about December 4, 2006, Camden-Clark filed a declaratory judgment action in the United States District Court for the Southern District of West Virginia in Parkersburg. See the December 4, 2006 Complaint for Declaratory Judgment, in the

Record. The declaratory judgment sought an interpretation by the Federal Court regarding the insurance coverage for the actions of Dr. Koyawala and Evelyn Melvin, who the Wood County jury determined were apparent agents of Camden-Clark and whether certain actions by those agents were covered under the St. Paul policy in effect for Camden-Clark in October 2001. *Id.* Specifically, part of the jury's verdict in the Boggs case awarded compensatory damages for the intentional torts of fraudulent concealment and outrage committed by Camden-Clark and there is a dispute as to whether those two intentional torts are covered under one of the four categories of covered injuries under the "What This Agreement Covers" provisions in both the Basic and Umbrella policies. Likewise, there is an issue regarding what portion of the punitive damages awards were for intentional acts not covered under the St. Paul insurance policy and what portion were for the medical negligence of the defendants.

Plaintiff filed a Motion for Partial Summary Judgment in this case, despite the fact that not one witness was deposed, and the Circuit Court certified the question currently before this Court.

III. CERTIFIED QUESTIONS

- 1. Under West Virginia law when an insured is found liable for a tort, and the complaint indicates that the tort could be based on conduct that the insurance policy covers, on conduct that the insurance policy does not cover, or both, and when the jury verdict does not specify which conduct gave rise to the insured's liability, does the insured bear the burden of proving that the liability was based on covered conduct, or does the insurer bear the burden of proving that the liability was based on non-covered conduct?
- 2. Under West Virginia law, when a jury awards punitive damages against an insured, and the punitive damages could be based on a claim covered

by the insurance policy, on a claim not covered by the insurance policy, or both, does the insured bear the burden of proving that the punitive damages were based on a covered claim, or does the insurer bear the burden of proving that the punitive damages were based on a non-covered claim?

IV. STANDARD OF REVIEW

As stated by this Court in Osborne v. United States, 211 W.Va. 667, 670, 567 S.E.2d 677 (2002), "[w]hen this Court is called upon to resolved a certified question, we employ a plenary review." "A de novo standard is applied by this [C]ourt in addressing the legal issues presented by a certified question from a federal district or appellate court." Id., citing Syl. Pt. 1, Light v. Allstate Ins. Co., 203 W.Va. 27, 506 S.E.2d 64 (1998). Since the questions posed by the United States District Court for the Southern District of West Virginia are questions of law, this Court should review the certified question posed by the district court by applying a de novo standard. See Id.; Feliciano v. 7-Eleven, Inc., 210 W.Va. 740, 744, 559 S.E.2d 713, 717 (2001) (holding that certified questions of law are to be considered using a de novo standard of review).

V. ARGUMENT

A. In West Virginia, The Insured Plaintiff In A Declaratory Judgment Action Has The Burden Of Proving That Coverage Exists On All Disputed Claims And The Burden Only Shifts To The Insurer Defendant After Coverage Is Established.

Before this court can determine who has the burden of proving that liability was based on covered conduct, a determination must be made regarding whether the claims from which liability arose are claims covered under the insurance policies at issue. It is axiomatic that a plaintiff in a civil action must meet his or her burden of proof in

order to prevail. Syl. pt. 8, in part, *Miller v. United Fuel Gas Co.*, 88 W.Va. 82, 106 S.E. 419 (1921). Said burden must be demonstrated by proving each element of each claim, by a preponderance of the evidence. *Legg v. Junior Mercantile Company*, 105 W.Va. 287, 142 S.E. 259 (1928).

The concept that the plaintiff has the burden of proof is one of the fundamental tenets of the American legal system, and one which applies in the context of a declaratory judgment action just as it does in a civil action in tort. State Farm Mut. Auto. Ins. Co. v. American Cas. Co. of Reading, PA, 150 W.Va. 435, 146 S.E.2d 842 (1966). Specifically, Section 23:58 of the handbook on Federal Procedure states as follows:

The Declaratory Judgment Act, investing the federal courts with power to declare the rights of any interested party seeking such a declaration, creates a situation in which the party seeking the declaration must plead and prove the facts which entitle him to relief, inasmuch as he is affirmatively seeking a judgment to establish his rights. The plaintiff seeking a declaratory judgment bears the risk of nonpersuasion regarding the elements of a plaintiff's prima facie case. [A] party who institutes a declaratory-judgment action carries, at a minimum, the risk of non-persuasion, if not the actual burden of proof. It has also been said that the burden of proof is not determined according to who is the actor in a lawsuit but rather by the nature of the relief sought; the burden falls upon the party who will be defeated if no evidence relating to the issue is given on either side." Federal Procedure, 10 Fed. Proc. L.Ed. §23:58 (emphasis added).

The West Virginia Supreme Court of Appeals has held that "where, in an action upon a policy of insurance, [the] insured has made out a prima facie case of loss within the coverage provided by the policy, the burden is upon the insurer to prove the affirmative defense that the loss is one for which the insurer is not liable because it

comes within an exception in the policy." Jarvis v. Pa. Cas. Co., 129 W. Va. 291, 291, 40 S.E.2d 308, 309 (1946). "It is only when the plaintiffs have established a prima facie case of coverage that the burden of production shifts to the defendants." Payne v. Weston, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995).

By way of example, in State Auto. Mut. Ins. Co. v. Alpha Engineering Servs., Inc., the plaintiff insurance company brought a declaratory judgment action seeking determination that a policy exclusion barred coverage for a mineral owner insured's liability to a third party. Alpha Engineering, 208 W. Va. at 715, 716m 542 S.E.2d 878-879 (2000). Because the insurer was the plaintiff in the action and because the insurer sought to avoid coverage under an exclusion, the insurer had the burden of proving facts necessary to trigger the operation of that exclusion. Id. at 716, 879. The court found that the plaintiff insurer proved the policy exclusion applied to bar coverage. Id. at 717. 880. Based on the aforementioned West Virginia case law, the insurer bore the burden of proof for two reasons: (1) because it was the plaintiff in the action and (2) because it sought application of a policy exclusion to bar coverage. If, on the other hand, the insured had instituted the action seeking application of coverage, the insured would have to first prove coverage with the burden shifting to the insurer to prove application of the exclusionary clause only after the insured established a prima facie case of coverage.

Unlike the plaintiff in Alpha Engineering, the Plaintiff bringing this declaratory action in the instant case is the insured, Camden-Clark. Thus, because Camden-Clark

is both the Plaintiff and the insured, it bears the burden of proving coverage of each claim in the insurance policy. In other words, Camden-Clark must first prove that coverage exists before the burden shifts to St. Paul to prove a policy exclusion applies to bar coverage. If Camden-Clark does not satisfy its burden of proving coverage, St. Paul is not required to prove operation of a policy exclusion to bar the claim.

Plaintiff continues to assert that the burden of proof lies with the insurer because it is attempting to deny coverage under an exclusion to the policy. While an exclusion may apply to exclude coverage in this case, the issue is never reached because Camden-Clark cannot show that St. Paul's policy definitionally would cover those acts of Camden-Clark, which the jury found were the fraudulent concealment of documents, the outrageous conduct stemming from the document alteration and the punitive damages stemming from this conduct. Specifically, Defendant is denying coverage because the claims at issue are not covered under the section which defines "What is Covered under This Policy," not because of some specific exclusion in the policy. Under both the Basic and Umbrella policies, there are four different types of coverage available; 1) medical injury liability, 2) bodily injury and property damage injury, 3) personal injury liability, and 4) advertising liability injury. Likewise, the policy would not cover a variety of other claims not contemplated by the policy like a breach of contract claim. Therefore, in order for the Plaintiff to prevail in this case, it must prove that the claims and damages at issue in this case are covered under one of these four categories under the Policies.

B. The Greater Weight Of The Caselaw Suggests That The Insured Should Bear The Burden Of Proving The Apportionment Of Damages From An Unallocated Verdict, And In Those Cases Where The Burden Shifts To The Insurer, The Trial Court Is Instructed To Interpret The Record, Verdict Form And Trial Transcript To Determine How To Properly Allocate The Damages.

No West Virginia court has addressed the issues contained in the certified questions before this Court, namely, when a jury verdict contains both covered and uncovered claims, what portion of the damages are awarded for covered claims and what portion are for uncovered claims. In the absence of any clear or consistent guidance on the issue, Plaintiff has quoted out of state cases, unreported cases, Delaware Superior Court cases and cases that can be easily distinguished, all with a purpose as self-serving as that which Plaintiff continuously accuses Defendant in its brief. Plaintiff wishes this Court to adopt the philosophy that if the insurer has the burden of showing the allocation of damages then coverage should apply to every claim. What Plaintiff refuses to acknowledge is that even in the cases that it cites the only real remedy is a remand to the trial court to inspect the record for evidence of the jury's intention to apportion the verdict.

"The majority rule in the United States is that where a judgment includes elements for which an insurer is liable and also elements beyond the coverage of the policy, the burden of apportioning those damages is on the party seeking to recover from the insurer." Universal Underwriters Insurance Corp. v. Reynolds, 129 So.2d 689, 691 (1961). See also Maryland Cas. Co. v. Gordon, 52 Tenn.App. 1, 371 S.W.2d 460 (1963) (holding that it would adhere rigidly to the rule placing the burden of proving allocation

on the person suing on the policy, even though the insurance company did not explicitly warn its insured of the dangers of an allocated verdict). See also Morris v. Western States Mut. Aut. Ins. Co., 7 Cir., 1959, 268 F.2d 790; General Accident Fire & Life Assurance Corp. v. Clark, 9 Cir., 1929, 34 F.2d 833; Yancey v. Utilities Ins. Co., 23 Tenn. App. 663, 137 S.W.2d 318; Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co., 85 Cal.App.4th 1300 (2001) (holding that where both covered and uncovered events cause damages, a failure to differentiate and allocate is fatal to a claim for indemnity); Raychem Corp. v. Fed. Ins. Co., 853 F.Supp.1170 (1994) (holding that the initial burden to show allocation should be on the insured, particularly in a case where the insured chose counsel for itself and controlled the defense).

Of the cases that do hold that the burden either rests with the insurer or shifts to the insurer after a prima facie showing of coverage by the insured, a majority of those cases require the trial court to review the content of the jury instructions, verdict form and the trial record for evidence of how the verdict was intended to be apportioned by the jury. See Commercial Union Ins. Co. of N.Y. v. Reichard, 404 F.2d 868 (1968) (holding that an analysis of the jury instructions showed that unallocated punitive damages could have only been awarded for the intentional torts and not the general negligence of the insured). The case of In re Feature Realty Litigation involved a declaratory judgment action concerning the insurance carrier USF & G's excess liability coverage to the City of Spokane as it related to a settlement reached regarding the City's delays in the permitting process of a development. In re Feature Realty

Litigation, No. CV-05-0333-WFN, 2007 WL 2156605 (E.D. Wash, July 27, 2007). In that case, a \$5.5 Million unallocated settlement was reached between the City and the plaintiffs, with only one of the legal theories relied upon by plaintiff potentially covered by the insurance agreement between the City and USF & G. Id. The court, attempting to address the problem with the unallocated settlement, established the general rule that "the burden of demonstrating the loss is covered under the insuring agreement falls upon the insured[.]" The Court also addressed the issue of allocation and held that "if a judgment or settlement includes several claims, some of which are covered and others of which are not covered, allocation of the judgment or settlement is allowable when there is a reasonable means of doing so," such as information taken from the record. Id. at 7. The court went on to explain that since the claims all arose from the same factual core and the same underlying financial loss, there was really no way to investigate how the judgment should have been properly allocated. Id.

In the case at hand, this Court is faced with an issue of first impression, with no real decisive or persuasive authority directly on point from any State. However, whichever way the Court chooses to find regarding the burden of proof, both spectrums of the caselaw cited by the parties suggests that if the trial court can properly extract from the record what should have been the proper allocation of damages by the jury, it should do so.

1. The Cases Cited By Plaintiff In Support Of Its Argument Concerning Allocation Are Distinguishable From The Facts Of The Instant Case.

Plaintiff cites four main cases in support of its claim that because the jury's verdict in the underlying case contained both covered and uncovered claims, which were not specifically apportioned by the jury, that complete coverage must lie for every claim made. However, all of the cases cited by Plaintiff can be distinguished from the facts of the instant case for four important reasons.

First and most importantly, none of the cases cited by Plaintiff involved a policy with a self-insured retention and an insured who hired and paid for its own counsel, with an insurer with no duty to defend the case, or do anything else other than to pay THOSE CLAIMS COVERED BY THE POLICY after the limits of the self-insured retention were exhausted. Since all the cases cited by the Plaintiff involve primary insurers, with different duties owed to the insureds, the actions of St. Paul cannot be compared to the actions of any of the insurance companies in those cases. St. Paul's role in the Boggs case was similar to that of an excess carrier or underinsured motorist carrier in an auto accident case, where the primary carrier controls the defense of the case and the UIM carrier passively evaluates the possibility of excess exposure. In fact, an excess carrier "is entitled to rely on the primary carrier to defend the case-especially, as here, when the primary carrier has undertaken the defense and has promised to keep the excess carrier informed of major developments." *United States Fire Ins. Co. v. Nationwide Mut. Ins. Co.*, 735 F.Supp. 1320 (1990).

In the instant case, until Camden-Clark exhausted the Two Million Dollar selfinsured retention, St. Paul had no duty to act under the policy and acted appropriately by monitoring the case from afar. However, although St. Paul was monitoring the events of the Boggs case, there is no way that St. Paul could have possibly anticipated the award of multi-million dollar punitive damages claim against Camden-Clark, Dr. Koyawala and Evelyn Melvin because as we are now learning, most of the conduct for which the punitive damages award was based was covert, sanctionable action taken by Camden-Clark and Attorney Richard Hayhurst not completely known to St. Paul.

Second, the cases cited by the plaintiff primarily pertain to settled claims in which the insurer was made a part of the negotiation process and could have simply negotiated the allocation of the settlement of specific claims by including it in the settlement documents. This case involves a verdict against an insured, which is self insured with its own counsel making decisions about requests for the allocation of funds. The difference is polar opposite because a settlement gives the insurer complete control over the allocation of the funds, and the scenario with a verdict and self insured party with its own counsel arguing to a judge gave Camden-Clark no control.

Third, many of the cases cited by the Plaintiff involved "lump sum" awards or settlements where the parties did not have an opportunity or chose not to request an allocated verdict. In the instant case the parties attempted to create an allocated verdict form with twenty-eight separate and distinct subparts.

Finally, in all four of the cases cited by the Plaintiff the respective courts all acknowledge that it is the insured's burden to demonstrate coverage over the claims awarded the unallocated damages. All of these courts interpret this showing of coverage to be the initial burden in the case, before which any determination regarding the burden of proving the allocation of damages is premature. Therefore, since there

may not be an activity which gives rise to a shifting of the burden away from the insured to the insurer, it should be accepted that the initial burden rests with the insured.

The first case relied upon by Plaintiff to demonstrate that the burden to show an allocation of damages should shift from the insured onto the insurer is not even from an appellate court but rather is an unreported Delaware Superior Court decision, Premier Parks, Inc. v. TIG Ins. Co., No. 02C-04-126-PLA, 2006 WL 2709235 (Del. Super. Ct. Sept. 21, 2006). This case has no precedential value as it is an unreported decision by a Delaware Trial Court, and as such, it should be disregarded by the Court outright. Aside from the clear inadequacy of this citation, there are other more oblique and obvious factors that distinguish the facts of TIG from the instant case. TIG dealt with a settlement, where counsel for the insurance company had an opportunity to add their input, and Six Flags repeatedly requested TIG's input and guidance on their settlement approach. As more fully set forth above, a comparison of these to factual scenarios is impossible because a settlement allows the excess insurer to be fully aware of what it is agreeing to and the ultimate control over the situation. Conversely, a trial with counsel adverse to the excess insurer on coverage without knowledge of how the judge will rule or jury find when the self insured client and lawyer have acted improperly in altering documents allowed St. Paul no control over the circumstances of the verdict at all. In our case, Camden-Clark, as its own primary insurer due to the Two Million Dollar self-insured retention, selected its own counsel, Attorney Hayhurst, paid that counsel itself, controlled the defense of the case, and only kept St. Paul advised as to the

progress of the litigation by periodic reports. As such, unlike the insurance company in *TIG* that actively participated in the settlement, St. Paul in this case acted more as an excess carrier, evaluating the potential for an excess verdict and largely relying on the evaluations of Attorney Hayhurst.

Another unreported case cited by Plaintiff is the sister *Premier Parks* case, styled *TIG Ins. Co., v. Premier Parks, Inc.*, No. Civ. A. 02-C-04126JRS, 2004 WL 728858 (Del. Super. Ct. March 10, 2004). In that case, the Court held that it could not reasonably be expected to perform a post-verdict allocation of damages as between covered and noncovered claims when the record provided little, if any, evidence of the jury's methodology in reaching its damages awards. *Id.* The Court also said in that case that it was not possible from the transcripts alone to determine which theory was applied because the jury heard several, and, at times, contradictory theories of liability for punitive damages and "in the absence of clear direction in the trial transcript, the Court must focus its analysis on the verdict sheet." *Id. at 6*.

While this case has no precedential value at all, the holding by the Court in *Premier Parks* is actually contra to the Plaintiff's argument regarding the burden on demonstrating allocation in this case. Specifically, the premise for which Plaintiff cites the case is that "when a dispute over covered versus non-covered claims arises between an insurer and an insured, and the insurer assumes the insured's defense, the insurer must request an allocation of damages that will allow the parties to more readily address the coverage issues after trial." See Plaintiff's Brief on Certified

Questions at 13 (emphasis added). However, in the instant case, St. Paul never "assumed the defense" of the underlying claim since Camden-Clark had a Two Million Dollar self-insured retention, and Camden-Clark selected its own attorney and paid his bills. Essentially, during the underlying trial, St. Paul was nothing more than an excess carrier, with no duty to defend under the policy, who was simply monitoring the progress of the underlying case to evaluate potential excess damages. St. Paul was not regularly receiving copies of the attorney-client communications between Attorney Hayhurst and Camden-Clark during the course of the underlying litigation. St. Paul had no control over the defense of the case, nor over the actions of Attorney Hayhurst, who actually authored a response to the reservation of rights letter on behalf of Camden-Clark "rejecting and disavowing" the coverage position of St. Paul. Certainly, if Attorney Hayhurst would have been retained by St. Paul he would not have acted under what would have been an obvious conflict in trying to represent Camden-Clark in the underlying case and at the same time offering a coverage opinion. Since Camden-Clark, and not St. Paul, was controlling the defense and since St. Paul never assumed the defense of the underlying case, the requirement that St. Paul somehow intervene and demand an allocation of damages between the claims of the Plaintiff is as inapplicable as the entire *Premier Parks* case.

The third case primarily relied upon by the Plaintiff is *Duke v. Hoch*, 468 F.2d 973 (1973). Plaintiff advanced *Duke* for the premise that the burden to prove an allocation of damages shifts from an insured to an insurer when the insurer fails to

advise its insured that an allocated verdict would be required to avoid loss of coverage.

This premise is based upon three determinations made by the *Duke* Court:

- 1) That an insurer, which furnishes defense to its insureds in suit for both damages covered by policy and damages not covered, was required to make known to insured availability of a special verdict and divergence of interest between insureds and insurer springing from whether damages were or were not allocated; once insurer's counsel disclosed the situation, the insureds, represented by their own counsel, would be entitled to make decision whether to seek an allocated verdict;
- 2) Where insurer furnished a defense to insureds in suit for both damages covered by policy and damages not covered, presence of insured's own counsel did not dispense with the necessity of insured's counsel discharging his responsibility to disclose fully, before proceeding, the divergence of interest between the insureds and insurer springing from whether damages were or were not allocated;
- 3) Where insurer furnished a defense to insureds in suit for both damages covered by policy and damages not covered, insurer's notification of defense under a reservation of rights was not a sufficient notification to insureds that they should protect their interest by requesting an appropriate verdict.

Id.

As one can see from the language emphasized above, the requirements advanced by Plaintiff of an insurer in a case with an unallocated verdict, including the requirement to request an allocated jury verdict form, only apply in situations where the insurer has "furnished a defense" to the insured. This is not the circumstance in the instant case where St. Paul, who did not hire or pay Camden-Clark's attorney or control the litigation, and where St. Paul was not under a duty to defend. Therefore, the *Duke* case is inapplicable to the facts of the instant case and should be disregarded. It is worth noting that even the court in *Duke* indicated that a good source for determining the evidence on which the jury based its verdict is the trial transcript of the merits trial

and that the trial judge is in the best position of establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so. *Id* at 984.

The fourth case relied upon by the Plaintiff is Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F.Supp. 710 (1981). However, that case can easily be distinguished from the facts of the instant case, because in that case St. Paul "undertook the defense of the Chandler/Neeley [underlying] action and had the right to control the litigation." Id. at 716 (Bracked material added for clarification). As addressed above herein, St. Paul did not undertake a defense of Camden-Clark but rather acted as an excess carrier, monitoring the underlying litigation. Also, the Court in Gay & Taylor did not find that coverage applied outright to every claim advanced by the insured, but rather it remanded the case for the lower court to attempt to have an evidentiary hearing and make an apportionment of the damages between covered and uncovered claims. Additionally, the lower court did find enough evidence in the record to allocate the verdict, and reduce the verdict by an amount for uncovered claims. Id.

C. Regardless Of Whether The Burden To Prove The Allocation Of Damages From The Verdict Rests With The Insured Or Insurer, Both The Jury Verdict Form And The Trial Transcript Support The Fact That The Jury's Award For The Tort Of Outrage And Punitive Damages Was Because Of An Intentional Act Not Covered Under The Policy.

Unlike many of the "lump sum" cases cited by Plaintiff in support of its brief, the verdict form utilized by the jury at the trial of this case was allocated twenty-eight

different ways to separate damages out amongst the parties, with the language carefully scrutinized by the court and mostly agreed upon by the parties.

Each individual tort claim was separated out against each individual Defendant (some dismissed). Each area of damage was parsed out amongst each potential Plaintiff. And the language adopted by the court for the verdict form interrogatories regarding punitive damages was carefully worded to distinguish damages arising from intentional conduct versus medical conduct. This was not a situation where the court simply had a two question interrogatory with a lump sum award now incapable of interpretation.

Although the United States District Court for the Southern District of West Virginia has not specifically identified those sections of the verdict form that gave rise to the certified questions, there are only three verdict form interrogatories that could possibly give rise to the current issue. Interrogatory No. 2 requested whether or not the jury found that Camden-Clark's "conduct toward Ray Boggs was so outrageous that a reasonable person could not have been expected to endure it?" See, the Jury Verdict Form, attached to Defendant's Response to Motion for Summary Judgment, in the Record. Presumably the district court is unsure whether the award concerning the outrageous conduct was based on conduct that was reckless or intentional, thus giving rise to the first certified question. However, a review of the record makes it apparent that the only conduct claimed by Plaintiff that could rise to the level of outrageousness was intentional conduct. The claim of outrage was brought by Bernard Boggs, the husband of the decedent. However, the facts as alleged in the Complaint in the

underlying matter and the facts as argued to the jury at trial concerning outrage demonstrate that this claim does not arise out of medical treatment rendered by Camden-Clark or any other health care provider to the individual bringing the claims. Mr. Bernard Boggs. See Complaint at ¶ 15, and Trial Transcript pp. 36-40, in the Record. Moreover, the claim for outrage has nothing to do with a health care provider rendering care to anyone, as such a claim arose from Camden-Clark's destruction of evidence, altering of documentation, concealment of the true nature of Hilda Boggs' death and the attempt to cover-up the circumstances surrounding her death. See Trial Transcript, pp.36-40, in the Record. Simply put, the claim of outrage cannot be a medical professional injury because it is the claim of Bernard Boggs, who was not a patient of Camden-Clark, and the evidence offered at trial to prove outrage was evidence concerning the destruction of documents and the altering of medical records, not based on providing health care to Mrs. Boggs. Therefore, the Estate could only maintain an action for the tort of outrage and the punitive damages award must only have been intended to address the intentional conduct.

The jury interrogatories giving rise to the second certified question are interrogatories No. 11 and 12, which state as follows:

- 11. Do you find that the conduct of Camden-Clark Memorial Hospital, separate and apart from any conduct of Dr. Koyawala or Evelyn Melvin, was so outrageous, wrongful or intentional that punitive damages should be awarded?"
- 12. Do you find that the negligence of Dr. Koyawala or Evelyn Melvin was so excessive, reckless or aggravated that punitive damages should be awarded?

See, Verdict Form, attached to Defendant's Response to Motion for Summary Judgment, in the Record.

The trial court attempted to minimize the potential for ambiguity with the allocated verdict by crafting the two above interrogatories on the issue of punitive damages, one that dealt with intentional acts (No. 11) and one that dealt with medical negligence (No. 12). The words "outrageous," "wrongful" and "intentional" in verdict form interrogatory No. 11 were chosen specifically to avoid any allegation that the conduct giving rise to the award of punitive damages could be mere negligence and not intentional conduct. The fact that the court used the word "negligence" in verdict form interrogatory No. 12 demonstrates that it intended and appreciated the absence of the word from verdict form interrogatory No. 11. Proof of this intent and the trial court's intent to create a punitive damage interrogatory that addressed only the intentional acts of Camden-Clark can be found in the March 9, 2006 hearing transcript:

THE COURT:

The first thing I'm going to do is put a separate line in there under 11-A. What amount of punitive damages do you award against Camden-Clark Memorial Hospital? And change the 13 to a 12-A, what amount of damages do you award against Dr. Koyawala or Nurse Melvin? So it would cancel out the verdict as to whether Camden-Clark is liable for punitive damages against Koyawala and Melvin.

See the March 9, 2006 Trial Transcript, 185-6 (emphasis added).

By the Court's own words it intended there to be opportunity for separate punitive damages awards for Camden-Clark and Dr. Koyawala/Nurse Melvin, so that the very situation we currently find ourselves in could be avoided.

Why those different words were chosen by counsel for the parties was specifically addressed by the court at the pre-trial conference:

THE COURT:

In 11 and 12, why do we use different words for punitive damages with the hospital and against Dr. Koyawala and Nurse Melvin? What's the difference?

MR REGAN:

The difference is that the wrongs alleged against Camden-Clark for which punitive damages are awarded are intentional. Nobody is claiming that they carelessly destroyed the evidence or recklessly destroyed the evidence, they did it on purpose. And with respect to Dr. Koyawala and Evelyn Melvin by contrast nobody is claiming that they intentionally wanted Mrs. Boggs to be harmed, but rather that they were recklessly indifferent to her safety in turning off the monitors. So, I think the appropriate language of punitive damages are available both for reckless and intentional misconduct, and that's why I separated it out that way.

See the March 9, 2006 Trial Transcript, 183-4 (emphasis added).

Interestingly enough, not only did counsel for Plaintiff accept this explanation at the March 9, 2006 hearing, in its Petition for Appeal filed with this Court on December 18, 2006, it adopted it outright, stating "Plaintiff [Boggs] readily conceded that the only conduct for which he believed Camden-Clark could be held independently liable for punitive damages was in essence a claim of intentional spoilation of evidence." See the Petition for Appeal at 22 (Bracketed material added for clarification). Additionally, there is no obvious reference in the record of counsel for Plaintiff or Defendant seeking a punitive damage award for the negligent conduct of Camden-Clark. However, now faced with the possibility of having to pay another Three Million

Dollars out of its own pocket (in addition to nearly \$1.5 Million in sanctions for the conduct of its lawyer) to pay for the jury's award of punitive damages against it, new counsel for that same Plaintiff/Petitioner wants to argue to this Court that there is no way to tell what was going through the jury's mind when it awarded punitive damages for the outrageous, wanton or intentional acts of Camden-Clark.

Another good place to look to determine how the jury would have allocated damages if requested is the trial transcript from the closing argument of Attorney Chris Regan, counsel for Mr. Boggs. In his closing, Attorney Regan requested punitive damages for such intentional acts as altering the heart monitor strips by removing the times from the top of the strips, destroying notes from meetings with nurses and employees following Mrs. Boggs' death and attempting to create a cover-up. See Trial Transcript, 37, 38:1-18, attached to Defendant's Response to Motion for Summary Judgment, in the Record. Attorney Regan, counsel for Mr. Boggs, was very specific in his closing argument when he characterized the kind of actions that he believed gave rise to an award of punitive damages against Camden-Clark. Specifically, Attorney Regan requested the following relief from the jury:

And then there's another question there, if you think Camden-Clark Memorial Hospital is liable for punitive damages. And that question, really by that time, you will already have answered it, because if you find that they have fraudulently concealed these things from the family, that the evidence is, in fact, gone, that they have covered this up, that they joined in Dr. Koyawala's scheme to cook up a story to make this all better for them, to go away, then you will have to ask yourself whether or not you think that conduct is—let me look at the words. "Do you find that the conduct of Camden-Clark Memorial Hospital separate and apart from the conduct of Dr. Koyawala and Evelyn Melvin is so

outrageous, wrongful or intentional that punitive damages should be awarded?

Ladies and gentlemen, you cannot mount a coverup like this without doing it on purpose. They did it on purpose. Sherry Johnston told people, "Destroy your notes."

You cannot get rid of the times on these strips without doing it on purpose, intentionally, maliciously, in order to cover up what has been done. And the judge's instructions on that are clear, that you can consider in your sole discretion what is the proper penalty for that. Or it is in your discretion to say that there should be no penalty for that if that is what you believe, that they should get away with that, that they're entitled to do that, that it's all peer review, even though it's not peer review or you wouldn't have heard a word about it. It's not peer review. They have no right to hide the basic facts about what happened from this family. To tell people to destroy evidence so it won't be discovered in a lawsuit is beyond the pale of reasonableness.

But it is in your discretion to determine the damages for something like that. But they do tell you in the instructions when you do consider that, if you find that punitive damages should be awarded, you don't—you're entitled to consider who you're awarding them against and not just who you're awarding them for. Camden-Clark Hospital, they're a heavyweight around here. And a heavyweight is not punished with a featherweight punishment.

See the Trial Transcript at 37, 38:1-18 (emphasis added).

Based upon the amount of time and argument devoted by the Boggs' counsel to the issue of the intentional conduct of Camden-Clark, including the destruction of records and the attempted cover-up that followed, the evidence most strongly supports the suggestion that the jury's award of punitive damages was in response to the Boggs' request that Camden-Clark be punished for its conduct in handling the documents, which were intentional acts, and not for any medical treatment that was negligence or recklessness.

1. An Ambiguity In The Verdict Form Should Not Be Construed Against The Defendant Simply Because It Is An Insurance Company.

In the final section of Plaintiff's brief it astoundingly argues that becuase ambiguities in insurance agreements are construed against the drafter, most of the time the insurance company, the same principle should apply with any ambiguities in a verdict form. Such a conclusion simply is not based upon logical reasoning. An insurance contact is drafted by an insurance company, oftentimes approved by an insurance commissioner and sometimes presented in a boilerplate take-it-or-leave-it fashion, with the insured arguing at trial that he was at an unequal bargaining position. Verdict forms bear no resemblance whatsoever to an ambiguity in an insurance policy. In the instant case, Plaintiff had the counsel of its own choosing, who had the opportunity to submit his own verdict form and to object to the verdict form of the Plaintiff in the underlying case (the Boggs). St. Paul was not part of the underlying litigation process, did not participate in the pretrial conference, and was not represented at the trial of the underlying matter.

Plaintiff cites St. Paul Fire and Marine Ins. Co. v. Shernow to support the premise that an ambiguity on a verdict form should be construed against the insurer and in favor of coverage. St. Paul Fire and Marine Ins. Co. v. Shernow, 22 Conn. App. 377, 577 A.2d 1093 (1990). At issue in Shernow, however, was whether an ambiguity related to indemnification and coverage should be construed in favor of the insured, not an ambiguity in a jury verdict. Id. at 383-84, 1096. The court in Shernow found that the special interrogatories submitted to the jury were straightforward and unambiguous,

and remanded the case with a direction for the trial court to decide the issue of coverage. The holding in St. Paul v. Shernow clearly does not advance the premise that any ambiguity in a verdict form should unilaterally be construed against an insurer, and in favor of coverage.

Plaintiff also cites the case of Hirrera v. American Standard Ins. Co., which similarly involves an issue of coverage, specifically whether property damage coverage is included in an uninsured motorist policy. Hirrera v. American Standard Ins. Co., 203 Neb. 477, 279 N.W.2d 140 (1979). In Hirrera, the jury returned a general verdict, with only one amount of monetary damages in the entire case. Id. (For a thorough discussion of the facts and conclusions of Hirrera see High Plains Co-op Ass'n v. Mel Jarvis Const. Co., Inc., 137 F.R.D. 285 (1991)). American Standard, the insurer in Hirrera, sought to subtract from the jury verdict the amount of property damage, which they alleged was not covered in the uninsured motorist policy. Hirrera, at 482, 144. The court held that because the jury awarded a single monetary amount of \$5,000, it was not possible to differentiate what of this award was given for covered bodily injuries, and what was for non-covered property damage. Hirrera, at 483, 144.

Hirrera advanced the proposition that when a jury submits a general verdict, with one whole monetary award, an insurer cannot subtract a specific amount from the whole alleging it arose from a non-covered event. In the present case, Defendant contends that the entirety of the amount awarded in 11(a) of the Verdict Form was

awarded for a non-covered event, and does not seek to carve out only a certain sum from an amount awarded.

The court also points out in *Hirrera* that the uninsured motorist statute was intended "...for the benefit of an innocent victim...and to be liberally construed to fully accomplish that purpose." *Hirrera*, at 481, 143. There is seemingly no question given the facts in this case that the Plaintiff is not an innocent victim seeking insurance coverage. Instead, Camden-Clark is a multi-million dollar self insured entity, which hired its own counsel, retained its own lawyers, who altered EKG strips and intentionally concealed them from the family of a victim it knew suffered malpractice. The *Hirrera* case could not be more different, and as such, has no application to this case.

D. Plaintiff's Estoppel Argument Must Fail Because Defendant Issued A Valid Reservation Of Rights Letter And Denial Of Coverage Under Both The Basic And Umbrella Policies, Prior to Any Detrimental Reliance By the Plaintiff.

West Virginia law does not generally require that an insurer specify each specific insurance policy provision upon which the company is relying in reserving rights to investigate or decline coverage when issuing a reservation of rights letter to an insured.³ As such, there is no authority which suggests that waiver or estoppel automatically applies to a reservation of rights letter that specifically references certain policy provisions, and contains a general reservation of rights regarding other areas of

West Virginia has indicated on some level that when an automobile insurer cancels an insurance policy the specific exclusion or provision in the policy which gives rise to the insurance shall be stated with particularity.

coverage. In this case, the December 27, 2005 reservation of rights letter from Sam McEwen of St. Paul to Sherry Johnston of Camden-Clark specifically referenced a coverage issue concerning the despoilation of evidence claim made against Camden-Clark by the Boggs, but then also contained this general reservation language:

Please be advised that nothing in this letter should be construed as a waiver of St. Paul's rights under any of the provisions of the St. Paul policy or any other defenses that St. Paul may have. St. Paul expressly reserves all of its rights to limit or deny coverage on the basis of any other grounds, whether or not expressly set forth herein. Any investigation, defense, negotiation, or settlement of any claim or lawsuit does not waive or stop St. Paul from subsequently denying a duty to defend or indemnify. See the December 27, 2005 letter, in the Record.

Although no West Virginia court has addressed this issue, a U.S. District Court in the Eastern District of Pennsylvania considered the same waiver argument that the instant Plaintiff is attempting to make, in the case of *Pizzini v. American Int'l Specialty Lines Ins. Co.*, 210 F.Supp.2d 658 (E.D. Pa. 2002). In that case, the court analyzed and approved a reservation of rights letter that did not specifically identify each specific ground for which it was reserving its rights to deny coverage but did contain a "catchall" statement that the insurance company reserved its right to raise other issues or defenses that might contain coverage. The court approved this reservation of rights and held that although the insurance company "did not specifically state that this would be a ground on which to deny coverage in its reservation of rights letters, the letters nevertheless did contain language reserving the right to raise other issues and defenses that might affect coverage." *Id* at 2, 268. Thus, the court held no waiver or estoppel to apply.

In the instant case, despite the fact that Plaintiff has filed at least four separate declaratory judgment actions concerning this matter, and has amended three of those four Complaints at least once, Plaintiff has failed to aver even one time in those Complaints that Defendant is estopped from arguing coverage. In fact, Plaintiff failed to adequately raise an estoppel argument in its Motion for Summary Judgment and only raised it in its Reply brief to the District Court. As such, this argument should be disregarded by this Court as it was not properly plead in any of Plaintiff's numerous Complaints and amendments.

Assuming this Court chooses to entertain Plaintiff's estoppel argument, the Plaintiff cannot meet the elements necessary for proper estoppel, which requires:

- 1) Must exist a false misrepresentation or a concealment of material facts;
- 2) Must have been made without knowledge, actual or constructive of the facts;
- 3) The party to whom it was made must have been without knowledge, or the means of knowledge of the real facts;
- 4) Must have been made with the intention that it should be acted on; and
- 5) The party to whom it was made must have relied on or acted on it to his prejudice.

Cleaver v. Big Arm Bar & Grill, 202 W.Va. 122, 128 (1998).

Plaintiff represents that Defendant's silence amounted to a representation of a material fact but offers no clear caselaw to support this duty. Courts have required that an affirmative duty to speak arises only when a confidential or fiduciary relationship exists between the parties. Casa El Sol-Acapulco S.A. v. Fontenot, 919 S.W.2d 709 (Tex.App.Houston 14 Dist. 1996). Additionally, "mere silence will not work an estoppel;

to be effective it must appear that the person to be estopped has full knowledge of all the facts and of his rights, and intended to mislead or at least was willing that another party might be mislead by his attitude." Wallace v. St. Clair, 147 W.Va. 377, 400, 127 S.E.2d 742, 757 (1962). In the instant case, Plaintiff cannot meet its burden of demonstrating the elements of estoppel. For example, in this case St. Paul issued two separate reservation of rights letters, one after the four suits were filed against Camden-Clark and one after the jury's verdict in the underlying Boggs matter. Plaintiff has known about the effect those reservation of rights letters could have on the Basic and Umbrella policies since that time and thus can't meet prong three of the estoppel test.

Although Plaintiff suggests in its Reply brief that it is "axiomatic" that it was induced to act or refrained from acting to its detriment because of its reasonable reliance on the presence of Umbrella coverage, it has demonstrated no proof of the same. Specifically, Plaintiff has failed to offer any evidence that it acted, or refrained from acting in any way on the Umbrella policy in response to any of St. Paul's reservation of rights letters. Rather, Plaintiff simply suggests that it believed there was coverage and that is enough.

Because Plaintiff cannot meet all the elements required to prove equitable estoppel, Plaintiff's estoppel claim must fail.

1. Based On The Conduct Of Camden-Clark And Its Counsel In Handling The Underlying Claim, Camden-Clark Should Be Excluded From Making An Equity Argument Because It Comes To The Court With Unclean Hands.

With respect to the claim of equitable estoppel, the equitable maxim applies that a party who seeks equity must come with clean hands. "Equity never helps those who engage in fraudulent transactions, but leave them where it finds them." *Province v. Province* 196 W.Va. 473, 484, 473 S.E.2d 894, 905 (1996) (citing *Moore v. Mustoe*, 47 W.Va. 549, 552, 35 S.E. 871, 873 (1900)).

The West Virginia Supreme Court noted that the clean hands maxim "...bars relief to those guilty of improper conduct in the matter as to which they seek relief. It is invoked to protect the integrity of the court." *Hogland v. Curtis*, 134 W.Va. 735, 752, 61 S.E.2d 642, 652 (1950) (citing 30 C.J.S., Equity § 93).

Other jurisdictions have similarly defined the doctrine of unclean hands. The Fourth Circuit Court of Appeals held that "...unclean hands prevents a plaintiff from obtaining equitable relief if the plaintiff has been "guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on." Worldcom, Inc. v. Boyne, 68 Fed.Appx. 447, 451 (2003) (citing Richards v. Musselman, 221 Va. 181, 267 S.E.2d 164 (1980)). If the court finds that declaratory relief is an action in equity, the equitable maxim applies that a party who seeks equity must come with clean hands. "Equity never helps those who engage in fraudulent transactions, but leave them where it finds them." Province v. Province 196 W.Va. 473, 484, 473 S.E.2d 894, 905 (1996) (citing Moore v. Mustoe, 47 W.Va. 549, 552, 35 S.E. 871, 873 (1900)).

Based on the conduct of the Plaintiff and its hand-picked counsel in litigating the underlying case, for which it was sanctioned over One Million Dollars, and found to have destroyed documents, falsified records, knowingly provided false statements, violated court orders and intentionally filed misleading documents, among other things, Camden-Clark has unclean hands as it comes before the Court requesting equitable relief. This becomes even more apparent when considering that Camden-Clark and its counsel controlled this sanctionable and morally corrupt defense and opposed St. Paul on coverage issues during the litigation itself. Rather, Plaintiff is desperately looking for this Court to bail it out of the bed it has made for itself, with its own sanctionable actions.

VI. CONCLUSION

For the reasons stated above, St. Paul respectfully requests that this Court to enter an Order finding that the Plaintiff has the burden of proving coverage in response to the certified questions before the court.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Plaintiff,

 \mathbf{v} .

Supreme Court Docket No. 080493

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Defendant.

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